IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TARA L. LONG and TODD J. LONG,
Administrators of the Estate of
TAMMY E. LONG, Deceased,
Plaintiffs, Civil Action 15-1477
vs.

ARMSTRONG COUNTY, d/b/a
ARMSTRONG COUNTY JAIL, and
DAVID HOGUE,
Defendants.

Transcript of Oral Argument Proceedings on Thursday, February 25, 2016, United States District Court, Pittsburgh, PA, before Mark R. Hornak, District Judge.

APPEARANCES:

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(Proceedings held in open court; Thursday, February 25, 2016.)

THE COURT: We're here today in the case of Tara L. Long and others, plaintiffs, versus Armstrong County, Pennsylvania, and others, defendants.

Will counsel for the plaintiff please enter their appearance.

MR. KONTOS: George Kontos on behalf of the plaintiff.

MS. McGEE: Claire McGee on behalf of the plaintiff.

THE COURT: Good morning, Mr. Kontos. Good to see you.

Good morning, Ms. McGee. Nice to see you.

Will counsel for the defendant please enter his appearance.

MR. MacMAIN: Good morning, Your Honor. David MacMain with the MacMain Law Group for the defendants Armstrong County and Hogue.

THE COURT: Good morning to you, Mr. MacMain. Safe travels in from Philadelphia?

MR. MacMAIN: I drove yesterday, made it halfway to Carlisle and finished the trip today.

THE COURT: We're here today to hear oral argument on the motions to dismiss that have been filed on behalf of all the defendants.

Mr. MacMain, as I understand your motions, if they

would be granted, it would completely conclude the case.

Is that correct, sir?

MR. MacMAIN: It would, Your Honor.

THE COURT: So, Mr. MacMain, since you represent the moving parties, we'll hear from you first.

And we'll make sure Mr. Kontos and Ms. McGee have plenty of time to address the Court, then we'll give you any rebuttal.

Counsel is welcome to present seated or standing at counsel table. You can also use the podium. If you do use the podium, there's a little toggle switch on that microphone that will turn the green light on so we can hear you. If you stay at counsel table just adjust the microphone so they work for you.

With that, Mr. MacMain, we'll recognize you for your presentation.

MR. MacMAIN: I think I will stay at counsel table.

As Your Honor knows, what is before the Court is a motion to dismiss in which we've accepted as true all of the facts as pled in the complaint. Even accepting all those facts as true, we believe as a matter of law, the claim simply does not -- is not legally viable.

I begin, Your Honor, by saying I'm mindful, my clients are mindful this is a sad and empathetic case. I had a chance to meet Ms. Long's daughter just before we began. I'm

certainly mindful of the tragic circumstances that bring us here today. However, the DeShaney case, which is the seminal case which sets forth the state-created danger claim, which is what the case is pled under, the Supreme Court cautioned that judges and lawyers, like other human beings, are moved by natural sympathy in a case like this to find a way for the family to receive compensation for the grievous harm inflicted. But before yielding to that impulse, it is well to remember, once again, that the harm was inflicted not by the defendants but by Mr. Crissman in this case. I begin by noting that because we do come to this argument, to this case with a recognition that the facts certainly are compelling and sad.

Under the state-created danger claim, however, Your Honor, there are four elements that have to be proven. I'm going to address three of them. The fourth one I'm going to concede for purposes of the motion.

Those elements are the harm had to be foreseeable and fairly direct.

Second, the conduct of the defendant has to be conscious shocking.

Third, there needs to be a special relationship where someone has to be in a discrete class of persons.

And, fourth, there had to be an affirmative act as opposed to a failure to act which caused the harm in the case.

I'm going to address the first three, the fourth

one, Your Honor, again, I'm going to concede for purposes of the motion.

The first element, that the harm be foreseeable and be fairly direct. The language that cases talk about is it must be actual knowledge, has to be a sufficiently concrete risk. There has to be a fairly direct harm. The plaintiff must show that the actions of the defendant was the catalyst for harm when the defendant's actions versus omissions are separated from intervening forces which are not fairly direct.

In this case, Your Honor, even accepting the facts as pled by plaintiff, we have a whole series of steps, a whole series of events, none of which collectively or even individually or collectively were foreseeable. It's not foreseeable that this particular inmate, who had been in the facility numerous times before without incident or problem or risk had no history of violence, would escape.

It's not foreseeable --

THE COURT: Isn't it foreseeable or couldn't it factually be foreseeable that he would escape? It might not be foreseeable that he would cause the harm. If he's been a placid person when he's been in jail, was he ever in a position, does the complaint plead that he was previously in a position where he had unescorted access outside the walls or the fencing of the jail?

MR. MacMAIN: Well, I think he has. I'm not sure if

that's within the four corners of the complaint, so I don't want to argue facts, but even accepting that it is foreseeable that an inmate could escape, I guess that's always foreseeable, we have additional things that before we get to the ultimate harm and that is that he would escape, he would remain in the area, he would go to this specific home, that he would know the occupants of this home, that the occupants of this home would invite him in, that one of the occupants of the home would leave the home, leaving the inmate with Ms. Long, and that additionally that he would then commit this heinous act of violence. So, there are a whole series of things, all of which would had to have been foreseeable to meet the definition of the first element, and that is the harm has to be foreseeable and fairly direct. In this case, there are many intervening factors, there are many unforeseen things that occur, and as a result, I think even under the facts pled in the complaint, the first element of the state-created danger claim wouldn't be met.

The second element is the behavior has to be -- first of all, it has to be affirmative behavior as opposed to failing to act. I think that the argument really and the claim here is that the prison and/or under the auspicious of Warden Hogue didn't do enough, there was a failure to act as opposed to an action, didn't have enough security, didn't screen carefully enough, didn't have a fence around the prison, all

the things that are not affirmative acts but failures to act.

THE COURT: Even if all of those would be drained out of the complaint, let's assume Mr. Kontos never pled any of those, doesn't he get there on that burden by saying the jail had a program where they chose to let guys outside the fence without a guard. They chose to do that. So, whether or not they should have had higher fences or should have screened Crissman or should have evaluated him better, isn't the guts of the plaintiff's case that it's just outright dumb, if you will, to let people roam around who are in jail, to let them roam around outside the jail without escorts?

MR. MacMAIN: Well, I think that that's the gist of the complaint. That was actually addressed and rejected in the Russell case where the very same -- almost identical and actually more heinous facts, I would argue, in the Russell case, the Third Circuit rejected that. Not doing enough, not having enough security, having lax security simply doesn't meet the element that is necessary for the state-created danger.

So, in terms of the second element --

THE COURT: Under that theory, if the state, whether it's the state or one of its units of government said, you know what, one of the most expensive things about jails is walls and fences, so we're just not going to have those. We'll have a bunch of cameras and we'll kind of keep an eye on everyone. You can always recast doing an affirmative act as being the

non-doing of a negative act, and the failure to do something can be recast the other way around. So isn't that a bit semantic? Under your theory, a county could say, you know what, we'll really save a lot of money, we're going to have no walls, no fences and, in fact, we'll just have one guard and we'll put her or him up in a really tall booth with a lot of cameras and we'll give him a phone.

That would be a failure to act, if we don't have walls, we don't have guards. But isn't it also an act because the people running the show have elected to do things a certain way. So, isn't it also an affirmative act?

MR. MacMAIN: Well, I suppose if you have all of those factors, that extreme amount of factors, I think the argument --

THE COURT: Isn't it implicit in the complaint that somewhere along the way someone at the jail said, you know, we're going to decide not to send guards with these tray fellows while they're out picking the food up out of the van. So, yes, it's a failure to not have a guard standing there, but isn't it also an affirmative decision that was made to not have a guard standing there?

MR. MacMAIN: I suppose if it was recast in that light, I suppose it could be. I suppose any decision not to do something could be categorized as an affirmative act. But I think typically under the Russell case where these very same

allegations were made and the court rejected it, as really in the primary instance, it's a failure to act as opposed to an action. So, I suppose if you have all these factors, Your Honor, I think a more compelling argument could be made. I don't think that's the case here.

THE COURT: Okay.

MR. MacMAIN: The second element shocks the conscience. I think we started to talk about that a little bit.

The reason that the court, the Supreme Court in DeShaney and its progeny has set the bar so high as conscious shocking behavior, conscious shocking behavior being something so outrageous, so out of the norm, so troubling, the reason the bar is set so high is one could always say, government could do more. Police officers --

THE COURT: Is that a question of law or a question of fact?

MR. MacMAIN: Well, I think in the first instance, it's a question of law. Again, I'm even accepting the facts as pled by plaintiff in their complaint. We don't necessarily agree all the facts are accurate, but I think even accepting all those facts as true, I don't think it reaches, under the case law, including other escapes and parolee cases, reaches a level of conscious shocking behavior. So even accepting plaintiff's facts as true, it does not reach that legal

threshold that is necessary on these claims.

I'm going to turn to the third element, which I think is the one, of the three --

THE COURT: How do I determine whether something shocks the conscience? Am I to determine -- and I don't want this to be simplistic, but is it something that would cause a jury to say, what, they did what? Something more than that? Something less than that?

MR. MacMAIN: Well, that's a good question. I think certainly negligence doesn't cut it. Gross negligence doesn't cut it. I think within both briefs there is some description of what conscious shocking behavior -- I think the simplistic, my God, you're kidding me, in plain English, when I described to my clients conscious shocking in general, and see what do they think, it's kind of, I think, a common man definition.

THE COURT: At least it's a starting point to that, to exploring that concept.

MR. MacMAIN: I think that's right.

So turning to the third element, this is the one where I want to spend the most amount of time is the state-created danger requires some type of special --

THE COURT: You're welcome to use all the time you want. I thought you would use the least time and you would say, Judge, read Martinez, read Russel, you're a district judge, they're from the Supreme Court and the circuit, you have

no choice.

Isn't that kind of your argument in your brief?

MR. MacMAIN: It really is.

I'll just briefly respond to plaintiff's argument that you shouldn't look at Russell and you shouldn't look at Martinez and you shouldn't look at a whole laundry list of cases because they predate DeShaney is the thrust of the plaintiff's argument. However, these cases all talk about special relationship, which is the element, the third element of the state-created danger, which DeShaney recognized for the first time. So, with the Russell case, for example, and I'm going to touch on it briefly, you had almost identical facts here, as in here, a case in the Middle District, Potter County Prison where the very theories were, well, the inmate was in for homicide, burglary, theft and robbery. The allegation was --

THE COURT: If anything else, he was higher up the felon --

MR. MacMAIN: Certainly. I mean certainly there was arguably more notice to the prison officials. This was a violent guy, this was a guy who was capable of violent acts and, in fact, committed violent acts.

The allegations were similar here, that the prison didn't do enough, they didn't do a head count, locks weren't operable, they have been told -- this is where it is even more

egregious than this case, they had been told by the Department of Corrections in prior inspections that their security was problematic.

The guy escaped, kills a husband and wife, and the court held a number of these, one, there was no special relationship. I think there are two things particularly applicable here and that is that it held that a resident of the community, even those that lived near the prison are part of the members of the public at large. There's no discrete class that you live near the prison, you now have -- that the state has a different relationship or special relationship with them.

The second thing that the Third Circuit held, and this goes to plaintiff's secondary argument, and that is, well, the inmate really is just an agent of the state, so Armstrong County, whatever the inmate does as an agent, they're responsible for. The Russell case said very specifically, an inmate is not an agent of the state, they're an inmate.

THE COURT: But even if he was an agent of the state, unless he's a final decisionmaker, he can't bind the state because Monell says there's no respondeat superior in 1983 cases.

MR. MacMAIN: Correct.

THE COURT: So if we take this out of being an inmate, we make it the captain of the guards, and he leaves the jail in uniform and kills somebody at the filling station

catercorner from the prison, it would be horrific, but that doesn't make the county liable because there's no respondeat superior.

MR. MacMAIN: Right. Certainly that act would be far outside what you would expect, what a guard is authorized to do.

The special -- the public function test or the state actor argument also fails. It's really applicable when the government subcontracts to some private entity to fulfill a governmental function. For example, one of the prisons has a medical company they use to perform the function, provide medical care. I represent children and youth agencies, sometimes they'll subcontract out to a private social agency to perform counseling and --

THE COURT: Emergency medical services, those sorts of things?

MR. MacMAIN: Exactly. That's what the public function test is intended to apply to, not an inmate.

So, picking up on the signal that I don't need to argue --

THE COURT: You're welcome to, but --

MR. MacMAIN: But I think the cases are pretty clear, and this is where DeShaney comes in, it's unfortunate, but there is no special relationship between -- in this particular case, under these facts, and for those reasons, Your

Honor, even as a matter of law, even accepting the facts as pled in plaintiff's complaint, which are troubling, there's simply not a viable, legal cause of action.

THE COURT: Under the Constitution.

MR. MacMAIN: Under the Constitution.

THE COURT: Which is what is pled here.

MR. MacMAIN: Right.

THE COURT: Thank you very much, Mr. MacMain. You're deemed to have reserved time for rebuttal, if you choose to use any.

Mr. Kontos, sir, happy to hear from you.

MR. KONTOS: Thank you, Your Honor.

I want to jump around a little bit and just stay with the third prong. One of the things I want to point out is the idea and the conflation of the principles, the constitutional principles that defense counsel mixes up. He talks about special relationship. And special relationship, of course, came about as a result of the DeShaney case. That was the footnote that Justice Brennen put in there. That really applies to a custodial situation or special relationship where the state finds itself in a peculiar situation with a victim, oftentimes it's an inmate because they are devoid of the ability to care for themselves. That's different than the relationship prong that Kneipp set out when the Third Circuit adopted the state-created danger theory.

THE COURT: Hasn't every district court that has applied Kneipp since Kneipp continued to affirm the vitality of Russell? Certainly isn't Martinez still good law, which is from the Supremes.

MR. KONTOS: Martinez is still good law. I'm not suggesting that it isn't. But Martinez is very different. In fact, Martinez and the parolee cases, as I would call them, are still viable. I'm not suggesting that plaintiff -- plaintiff isn't suggesting that that's not good law, but they are wholly distinguishable and analyzed under a different rubric than what the Third Circuit set forth in a case such as this. In Martinez and those parolee cases, there is a great length of time, typically, that goes between the decision to release the person and then the crime that takes place; oftentimes months, oftentimes within great distances. That's very significant because I think it gets back to the idea of foreseeability. But there's no doubt that the defense relies almost exclusively on Russell. Russell was not using the same type of analysis that the Third Circuit has adopted since Kneipp, which has been confirmed in Morse and Bright in which the Third Circuit expanded the third prong of the state-created danger theory beyond just a specific individual and the idea of whether or not a person is part of the general public or not. Those cases basically said that a foreseeable, identifiable plaintiff could be a member of a discrete class. So that was something that

was not available to Russell at the time that Russell was decided.

I should point out, as we do in our brief --

THE COURT: But we know that Kneipp did not overrule Russell because one, it didn't say it did, and secondly, a panel of the Court of Appeals can't overrule a prior precedential decision of another panel.

MR. KONTOS: I'm not suggesting -- we're not suggesting that Russell has been overturned, but with respect to the analysis in this case, and the analysis that should be used, certainly, the Third Circuit has set forth a different rubric than that that existed at the time of Russell.

THE COURT: Do you have any case from a district judge in this circuit that stands for the proposition that Kneipp modified, fine tuned, amended, clarified Russell?

MR. KONTOS: Certainly the Third Circuit in the Morse case discussed at length the third prong and the analysis to be used.

THE COURT: Did they talk about Russell?

MR. KONTOS: Well, they don't talk about Russell, but in Russell, and I'll demonstrate at least from our perspective why the analysis that the defense suggests is inapplicable in this situation. In Russell, the court cited approvingly a case from the Sixth Circuit, the Nishiyama case. In Nishiyama, you had a trusting situation.

By the way, I should just digress for a moment. We are talking about cases like Russell, and talking about inmates and talking about foreseeability. It's very different than being an inmate. An inmate is something entirely different from a trustee for all the things that you alluded to in your questioning at the beginning of the defense argument, which is the state has to take some affirmative action in conferring that privilege and status upon a prisoner when they make he or she a trustee. It's different than just an inmate. You talk about the nomenclature issue as you discussed at length in your Benedict opinion, which is, you can characterize something as the failure to act, or action, and, of course, those semantical issues arise, as Your Honor noted in that opinion. But in this case, you can throw all of that out. The example that you gave about, well, the prison wants to cut costs so it doesn't do this and it doesn't do that. Here, we have an affirmative act on the part of the state. They confer this. Realizing, too, that society through the legislature has said, we want to incarcerate these prisoners, they're to be devoid of their freedom, all that kind of stuff, and the state, through the prison, makes the decision to confer the special status and give them those privileges. That's action. There's no nomenclature, there is no semantical issue with that. That was not the case in Russell. Russell was a prisoner. A lot of these cases were prisoners.

THE COURT: Crissman was a prisoner also. The point in Russell was they had flimsy locks, any Tom, Dick or Harry would know you can stroll out the back door, so I don't know that that's the distinction between Russell and in this case, Crissman being outside the wall with the food trays.

MR. KONTOS: The court in Russell, I would suggest to Your Honor --

THE COURT: Russell assumed the prison was a sieve.

MR. KONTOS: I think that Russell did put significance on that because at the end of the decision, Russell cites with approval and points out the situation where liability under Section 1983 would happen. That's in Nishiyama.

THE COURT: Nishiyama was overruled by the Sixth Circuit, wasn't it?

MR. KONTOS: I'm talking about Russell's analysis and its reliance on that. In that situation, there was a trustee situation, it wasn't just a prisoner. He was given instrumentality from the state to effect his crime and the victims in that situation were remote. If you look at the cases post-Russell in the Third Circuit that deal with the analysis of that third prong in terms of an identifiable plaintiff, I think --

THE COURT: The only one we could find is Chief Judge Kane's decision in Fleckenstein where she goes through

seven or eight specific prior relationships between the victim and the prisoner. It was a specific one-on-one tie-in.

MR. KONTOS: I think a case that is instructive to the Court would be the Morse decision in which the court --

THE COURT: In which Judge Scirica said there was no claim under the state-created danger.

MR. KONTOS: He did, but he did not analyze the third prong. In Morse, the reason was -- and that's a case of course, in which there was a school, they propped open a door. So there was no affirmative conduct, it's all sort of failure to act. There was no allegation the court said in that case, there was no allegation that they had any idea that that person had any violent propensities. It was a mental patient. The court did not get to the third prong.

THE COURT: Where in your complaint is the allegation that the defendants here had knowledge that Crissman was violent?

MR. KONTOS: It is replete with that, Your Honor. It's replete insofar as he had a history of breaking and entering, that he had a history of theft, that he had multiple instances --

THE COURT: People steal stuff from Target every day, they're not violent, they're dumb, they're greedy. That would make every crime a crime of violence.

MR. KONTOS: I would suggest that it wouldn't. It

is a fact --

THE COURT: Bernie Madoff stole $4 billion. That's a theft of almost unparalleled nature. Is that a crime that shows that Mr. Madoff had violent propensities?

MR. KONTOS: Perhaps it doesn't, but I would respectfully submit to this Court that a person that has a long-settled history of drug abuse that affirmatively tells the people that are in charge of him, I'm going through drug withdrawal, he tells that to them, they had actual knowledge of that. You take upon that and --

THE COURT: Once a week I have men and women sitting in that chair right next to Mr. MacMain who have long histories of severe drug dependencies. There's absolutely nothing in their record -- in fact, they're on bond, not in any custody. There's nothing in their record that reveals that they're violent.

MR. KONTOS: I would agree with you that that happens let's even say 90 percent of the time. But it is foreseeable that 10 percent of the time somebody with a long-term drug problem going through the throes of heroin addiction in terms of how desperate one might feel, knowing that they have a history, not of murder but of breaking and entering, breaking into someone's home, entering into someone's home, and the people that are supposed to make the decision as to whether or not to confer special status and give this person

access outside of the jail, is it foreseeable that that person in that situation with that background could conceivably take desperate measures --

THE COURT: Let me ask you this. If that's the way you phrase it, Mr. Kontos, isn't it at least Mr. Hogue, isn't he absolutely immune under Taylor v. Barkes and under Luna, because unless you can show that there's a decision of the U.S. Supreme Court or a consistent, longstanding body of precedent that says in that specific circumstances Hogue should have known this would happen, isn't he absolutely immune? So he's out of the case anyway? Not absolutely immune, qualified immunity.

MR. KONTOS: I don't think that it can be said that he didn't understand that that was violative of somebody's constitutional principles. Would he not --

THE COURT: No, but I'm obligated under Taylor and I'm obligated under Luna to define with precision the Constitutional right. And that would, it sounds to me, that a warden who would know that -- every warden, in fact, under Al-Kidd, the standard is every -- I have to conclude that the right was so clearly established that every public official in the same position would have known that having a heroin addict with a theft record as a trustee would violate the Constitutional rights of Ms. Long and her estate.

MR. KONTOS: I would add something to that, Your

Honor. I'll add this. Perhaps that's not actionable as you've stated it, but add to that --

THE COURT: I'm not saying I like it, but isn't that the law?

MR. KONTOS: Let me add something to it, though. If you add that same scenario and you add to it the prisoner says, I am actively going through heroin withdraw and your policy, Warden, is that this program, as we have pled, is only for DUI and people that failed to pay their child support. There's a reason for that. There's a reason for that because it's foreseeable that only the most vanilla of criminals should even be considered for the status.

So, I would suggest that if you tweak your suggested set of facts and you add to it that there's a policy that says, only DUI and only child support violators are to even be considered, which we pled and which was, in fact, the case, you add to it that somebody like Crissman says, I just took heroin 24 hours ago and I'm actively going through heroin withdraw, I think if you add that to it, I think at this stage, that --

THE COURT: Was there anything in the record? Was there anything in the complaint, the fact that somebody is going through heroin withdrawal gives them a propensity for violence?

MR. KONTOS: Well --

THE COURT: Doesn't it give them propensity for

being violently ill?

MR. KONTOS: Perhaps. Again, if you state it only that way, that's the case. But that's not the only thing we've pled. It's not just the person who is going through heroin withdraw, it's a person who is going through heroin withdraw that has a 15-year record of being in and out of this institution, violating parole, and he has a history of breaking and entering, and theft, crimes that cannot be, I think when taken in the light most favorable to the non-movant, to be said and devoid of the propensity for serious --

THE COURT: Theft does not have as an element any form of violence, physical violence against a person or property. Theft is walking into the 711, peeking around at the cameras and putting a Milky Way in your pocket. That's theft. It's also what Bernie Madoff did. There are all various permutations of it.

MR. KONTOS: Bernie Madoff did not break and enter into somebody's home, and I would suggest to you that that is a criminal act that cannot be said to, in all instances, be devoid of all violence. That was also in his history. I think when you take all those things, it can be said that this was not something that was completely unexpected. And the idea somehow --

THE COURT: Mr. MacMain I think will in a moment, tell me, Judge, it was completely unexpected because he had

been in our jail repeatedly and we never had any problems with him.

MR. KONTOS: That's like saying there's a reason in a motor vehicle accident case you don't say this person has never had an accident before, this has never happened before. If that was the standard, the first time that anyone did anything would not be actionable. The foreseeability is a much more involved analysis.

THE COURT: But you're not arguing foreseeability, you're arguing propensity. You're saying this is a permissible use of the doctrine of propensity, which is otherwise kept out of the law because we judge people's conduct on each occasion. But you're saying, legitimately, the jail should have foreseen he had a propensity for violence.

MR. KONTOS: Yes. I think as pled, and taking the facts as pled in the light most favorable, certainly.

The defendants say he's not a violent criminal, he's not a violent criminal. Well, I think if you look at all these things and you look at what he said --

THE COURT: Mr. MacMain, I don't know that he went that far. What he said in his papers was he had been in the jail before, they didn't have any problems with him.

MR. KONTOS: He said that he had never been arrested for a violent crime before.

And he also said the foreseeability is somehow

vitiated because the Longs invited, invited Crissman into their home. That is such a gross distortion that somebody could invite somebody when he under deception or by using deception, aided, by the way, by the conduct of the state.

But I want to get back --

THE COURT: Whoa, whoa, whoa. There the nothing in the complaint that says Crissman forced his way into the home in any way. He play have lied, but --

MR. KONTOS: Absolutely not. We didn't say that he forced his way into the home.

What we have said is that the state, through his action, aided his ability to deceive Ms. Long to get into her home.

THE COURT: How? How is that pled? What is pled in that regard?

Mr. Kontos, I don't want you to get the wrong impression. This is an absolutely horrific case, but you're asking me to thread the needle between a binding decision in the U.S. Supreme Court and a precedential decision of the Third Circuit, and maybe there is some daylight there, but I'm stuck, as would every U.S. District Judge in the circuit be bound, I'm bound by Martinez, I'm bound by Russell, and unless there is some daylight, I have to apply them.

MR. KONTOS: Well, I want to answer your question, then I'll get back to that. With respect to what was pled, in

our brief, we specifically go through all of the very detailed allegations that meet --

THE COURT: How did the state aid Crissman into getting into the Longs' residence, other than he was able to not be in the jail?

MR. KONTOS: Well, that's significant, of course, that he was -- they conferred this trustee status upon him, which gave him this access to the outside that allowed him to essentially walk off.

But the other thing they did that was active was that they made the decision to give him civilian street clothes. That's pled in the complaint. If he had been wearing a standard issue inmate uniform that said Prisoner on it, taken in the light most favorable to the --

THE COURT: Nobody in a federal prison wears any of those, they wear khakis, they look like Dickies.

MR. KONTOS: What we pled in the complaint is they issued him different -- as a trustee, he was issued different clothing and it was clothing that had no indication that he was a prisoner and it aided his ability to go up to that door, knock on it, and deceive the Longs, not to be invited. If he wore something that identified him as a prisoner, there is no way they would have let him in, knowing that the jail is only a mile away. You can see the jail from their house.

THE COURT: Isn't that a common law negligence

claim?

MR. KONTOS: Not in this context. We were talking about what did the state do? Isn't this just failing to act? In addition to conference of the trustee status on him, the state also did something affirmative by providing him with that clothing, made that choice, it wasn't a failure to act. It was very significant that he had that clothing on. This would not have happened --

THE COURT: Negligence includes taking affirmative actions, it's not simply omissions.

MR. KONTOS: But the negligence, Your Honor, the idea there is when you talk about negligence, was it deliberately indifferent to make that decision? Was there that level there to do it? I would suggest to you that in this context, it could be --

THE COURT: Deliberately indifferent to who? When a jail guard punches somebody who beats them up, or there's somebody in prison that has severe chest pains, they're obese, they're 66 years old, they have cholesterol through the roof and that person is laying on the floor clutching their chest and the jail elects to do nothing, you say, okay, they're deliberately indifferent to a guy who has every classic symptom of a heart attack. So who was the jail deliberately indifferent to here?

MR. KONTOS: Well, in this particular instance

talking about the clothing and the conference of trustee, certainly to those identifiable victims that lived within eyeshot of the jail.

THE COURT: So, if I'm to say that there is -- that Kneipp and Morse created daylight around Russell, I'm going to have to write an opinion that defines the class that was reasonably foreseeable and contemplated as being directly likely victims of this, what is the class?

MR. KONTOS: Well, do you have to define the class in every instance? The class in this instance, I would suggest to you --

THE COURT: I have to define it and then come to a conclusion as to whether Ms. Long was in it.

MR. KONTOS: Let's say this. The fact that there is a continuum in terms of what that class might be, the discrete class, does not mean that it can't be done or shouldn't be done. In this particular instance, if you look at all the facts, she is a resident that can see the jail, she lives within the community of the jail. So, to your point, where do I draw the line, Counsel, is it people that live five miles away, is it people that live ten miles away, 20 miles away? I don't know the answer to that. But the fact that I don't know the answer to that does not mean that in this instance it can't be said that Tammy Long and her family were so close that they would be within that ambient. And I think a good example of

that --

THE COURT: But I have to create a rule of law.

MR. KONTOS: Your Honor, can I --

THE COURT: I have to create a rule of law. I have to say in applying the third prong in what you say is the slit in the wall that Kneipp created post-DeShaney, I have to have a principle basis that I articulate as to what was the reasonably foreseeable, discrete, defined class, and then I have to determine whether Ms. Long was in it. I don't think I have the judicial luxury of saying, I know Long was in it, whatever it is, she's in it. That's not a principle judicial decision. I have to be able to write a decision that says: Here is what was foreseeable and is discrete and defined, and then make a determination whether, as pled in the complaint, Ms. Long fits within it.

So, I can't just say, I know she's okay. I don't have that luxury, Mr. Kontos.

MR. KONTOS: Let me address that in two respects.

First, the Third Circuit in the Morse case analyzed that issue and it relied upon, in great part, on the Reed case. The Reed case was a situation in which there was a sober driver and a drunk driver and the police pulled the person over. They removed the sober driver and they put the intoxicated driver behind the wheel. In that case, the court found that the random motorists on that stretch of highway were foreseeable

victims of the state in that case.

Now, how far could that be? Can we define that in every instance? The foreseeable victims under that analysis could be from here to Philadelphia if the drunk driver had a full tank of gas. So what I'm saying is even though -- any random motorist that passed that drunk driver on the road would be a victim. We don't know their names, we don't know if they just happened to turn on the same highway --

THE COURT: So, therefore, is the class here anybody's home that Crissman would have gone to? Is it anybody Crissman had ever met in his life? Is it any commercial establishment Crissman had ever been in?

MR. KONTOS: Of course not. But is it -- does it contain the nearby residents that are so close --

THE COURT: How nearby?

MR. KONTOS: I don't know exactly --

THE COURT: A five-minute walk, ten-minute walk, fifteen-minute walk?

MR. KONTOS: All I know is you can see -- I stood on Tammy's porch and you can see the jail from it. You can literally see the jail from it. We have pled that in the complaint. So then is ten miles too long? I don't know. I think what the courts have said in these situations is that foreseeability is a touchstone and that if this is a situation --

THE COURT: Is there anything pled that Crissman had ever met Ms. Tammy Long before?

MR. KONTOS: Yes, as a casual resident. I think she was an acquaintance as it is pled in the complaint. But I would suggest that any resident within walking distance, within eyeshot of the jail, he could have gone up to their door and said, hey, I just -- I ran out of gas.

THE COURT: Given that those are the facts in Russell, don't I have to say that Morse and Kneipp implicitly overruled Russell?

MR. KONTOS: What are the facts in Russell?

THE COURT: That it was somebody close to the jail in Potter County.

MR. KONTOS: Well, in Russell, we had an inmate, not somebody that was given trustee status. In Russell, which I think is significant, did not have the framework or the rubric that is now the modern, accepted approach post-Kneipp.

THE COURT: I understand that, but you are saying I have to write the opinion that denies Mr. MacMain's motion to dismiss, I have to say that Kneipp, relying on DeShaney, implicitly overruled or narrowed Russell. And that while Russell did not recognize that some subset of the general public, that is, identified as people in the close proximity of the jail is good enough, it is now.

MR. KONTOS: I don't believe you have to do that,

Your Honor, with all due respect. I don't think that you have to somehow say that you're attempting to overrule Russell.

THE COURT: Don't I have to say that Kneipp overruled Russell --

MR. KONTOS: No.

THE COURT: -- in that regard?

MR. KONTOS: No, I don't think that you have to. I think it's just understood that the analysis --

THE COURT: The trustee stuff has nothing to do with the zone of danger, that has to do with the shocks the conscious.

I have to conclude that the decedent, Ms. Long, was in a discrete, defined, in essence, zone of danger.

MR. KONTOS: Yes.

THE COURT: And that even though the decedent in Russell was exactly similarly situated, had Russell been decided after Kneipp, it would have come out differently.

MR. KONTOS: I believe that it would.

THE COURT: But that's what I have to say in the opinion to hold your way.

MR. KONTOS: I don't think that's overturning anything.

THE COURT: No, I can't overturn anything. I have to say Russell would have come out differently.

MR. KONTOS: I think that you are free -- I don't

think that this is as much of a thread of the needle as Your Honor suggests. Maybe it is, but however big that space is, I think that there is certainly plenty of guidance and analysis that allows an analysis on the Kneipp standards, all four, particularly with the third prong, to allow the Court to say under these particular circumstances, taking all the cases that we've talked about and particularly the Court's reliance in Morse on Reed and the emphasis that it gave in that case, what can be --

THE COURT: To find no liability. Reed found no liability.

MR. KONTOS: For a different reason, as with Morse. It wasn't analyzing that prong. But, certainly, Morse talked about Reed and relied upon it in terms of what it thought was the appropriate analysis. Clearly in that case, it said that a random motorist on the same highway, unknown, unidentifiable in terms of who they might be could be a foreseeable, identifiable plaintiff under the third prong.

THE COURT: I'll ask my question again.

You're saying I have to write an opinion -- for you to win, don't I have to write an opinion that says that if Russell were decided today, given Morse and Kneipp, Russell would come out the opposite way?

MR. KONTOS: I mean to the extent that the Court felt compelled to do it, it could do it. There are many

dissimilarities. Again, I would point out that in Russell, we are talking about an inmate, just an inmate. By its very definition then you're talking about policy failures, you're talking about lack of security, lack of --

THE COURT: That goes to the shock the conscience prong, that doesn't go to this identifiable victim prong, that goes to shock the conscience. That's how fundamentally stupid were the people running the jail.

MR. KONTOS: I also think it goes to the foreseeability prong. I think it does go to the identifiable victim because if you're going to give this person access, what might that person do? Who is in danger as a result of that?

THE COURT: But everyone is equally in danger, no matter how the person gets out of the jail, whether they get out of the jail because they were told they could go outside the walls with food trays, whether they got outside the jail because there were flimsy or no locks on the back door, once they're out of the jail, then it's no more or less foreseeable as to any potential victim. That goes to the foreseeability of how likely it is they're to escape.

MR. KONTOS: Okay. But getting back to Russell, Russell didn't use the language or analysis that the courts now use. It just simply didn't do it. It is literally an apples and oranges kind of situation.

THE COURT: What do I do -- I'm not the only

district judge roaming around the countryside here. We have Judge Harvey Bartle --

MR. KONTOS: Let's talk about Henry.

THE COURT: This is in Lipscomb.

MR. KONTOS: Okay.

THE COURT: He talks about complaint defining a discrete class of people, in this case, police officers. He says: To the extent Potteiger, Roderiguez, or Hernandez acted to cause a danger as a result of Jones' presence on the street, they caused a threat to the general population. There's no allegation that they did anything which made Jones a special danger to a specific group such as the police, or that Jones was more likely to cause harm to a discrete class of people than to the public in general.

So, he's relying on Russell post-Kneipp, post-Morse in 2013.

Henry is Judge DuBois. That was affirmed by the circuit, right? That's a 2007 case. Lipscomb is 2013.

If you look at Chief Judge Kane's decision in Fleckenstein, she focuses on -- she says the complaint is rife with allegations showing that Dowell had a relationship with the state as a victim of a crime and that Sabol and the probation defendants placed Dowell in danger of foreseeable injury.

Specific acts of prior harassment, they were aware

of previous violent conduct toward the victim, no contact orders as to the victim.

She goes through -- let's count the numbered elements here -- six of them. She cites to Martinez and says rejecting plaintiff's claims stating parole board was not aware that appellant's decedent as distinguished from the public at large faced any special danger.

MR. KONTOS: Well, Your Honor, there are numerous cases. Most of the cases that are cited in the defense brief are parole cases and like Henry --

THE COURT: Cite me one case from one district judge anywhere post-Kneipp, post-Morse that says, here's a prisoner case where it is an exception to Russell or Russell does not apply.

MR. KONTOS: I don't think that that is the standard upon which the Court needs to rely.

THE COURT: I agree, but it would be helpful. It would be helpful if you can point to one other -- if I'm first -- there are times that I'm first, Mr. Kontos, and I'm delighted to be first, I have written a surprising number of opinions, surprising to me where I'm supposedly, apparently, the first judge deciding something, but it would just be helpful to me if you could point to one case involving a prisoner, any type of prisoner post-Kneipp, post-Morse that says Russell is not an impediment to this claim.

MR. KONTOS: Well, the issue I would suggest is not being first or second or whatever, it's being right, and I think that --

THE COURT: I'm happy to be right. I spend all my days, I spend most of the nights that I'm not sleeping worrying about being right, Mr. Kontos. I frankly don't need any lawyer to tell me it's my job to be right. I'm asking for some help. I just need -- if you're telling me, Judge, it would be terrific if I could point you to another district court opinion, I'd do it, but there are none, you're flying first, Judge.

MR. KONTOS: I said that with respect, not as any sort of an affront to the Court. But I think that -- I think there is precedent in the Third Circuit by which this Court could find an actionable claim in this instance.

THE COURT: I'll take that as a no, that you're aware of no prisoner case post-Kneipp, post-Morse that said Russell was not an impediment to the claim.

MR. KONTOS: No trustee case where the state --

THE COURT: Are you even aware of a prisoner case?

MR. KONTOS: I'm not. But I don't believe, again, emphatically, that that in any way would not allow this case to go forward.

THE COURT: If I'm first, I'm first. I'm happy to be first. I just wanted to make sure that you believe I would

be first?

MR. KONTOS: As far as I know, you would be.

THE COURT: Okay.

So, the special relationship here relates to the geographic proximity of the residence Ms. Long lived in to the jail, coupled with the enhanced likelihood that that could lead to trouble because of at least the following affirmative decisions of the jail leadership; the clothing that was issued to and was worn by Crissman, and the decision in light of his pled specific physical condition at the time he walked off on tray duty as a heroin addict who had at least one crime that involved violence toward property, that made her a foreseeable and direct -- it made her a foreseeable victim of direct harm caused by the state?

MR. KONTOS: Yes.

THE COURT: Okay. I got it.

You may be right.

MR. KONTOS: Thank you.

THE COURT: Mr. MacMain, any rebuttal?

MR. MacMAIN: I'll be very, very brief. I think Your Honor would be the first. I think not only would you be the first, but you'd have to --

THE COURT: I have been the first in a number of things. I don't look for those opportunities, but if I have no choice, I'm happy to be first.

MR. MacMAIN: I think you have to additionally, as you indicated, indicate Russell would be decided differently. Russell talks of the very thing that we have been primarily focused on, that is the zone of danger. The Third Circuit said just living near the prison isn't enough, that one could argue if you escape from the prison, you want to get away from the prison as far as possible, so victims two miles away -- people who live two miles away could be equally in the zone of danger, five miles away.

THE COURT: What do you do with Mr. Kontos saying Morse, even though Reed is a Seventh Circuit case, Morse cited favorably to and relied on Reed, and Mr. Kontos says, Judge, that while you can state the definition, that is, other motorists operating on the highway, depending on the time of day and the highway, that could be 20 people, it could be 200 people, it could be 20,000 people, but that didn't get in the way of Reed saying those other motorists were in the foreseeable zone of direct harm, and then Morse cited favorably to Reed. What do you do with that?

MR. MacMAIN: Well, I think, first of all, the facts are very different. We have a whole body of case law talking about these facts, prisoners, parolees. I think this case and the one you cited from Chief Judge Kane out of the Middle District, if you had a scenario where the crime victim lived near -- the victim of the inmate's violence lived near the

prison and they said, I have received letters that this inmate is going to escape and kill me, and all these other things happened, it gets very, very specific to this person, I think that might be the case that would be different than Russell and the Middle District case and Judge DuBois' opinion and Judge Bartle's opinion, they would be facts that might support distinguishing it from Russell and the whole body of case law that has developed. But this case isn't that. She lived near the prison. It's unfortunate and tragic that it happened, but it doesn't make her in the zone of danger or there's no special relationship or, really, special duty, I think is probably another way to say it. So I think for all the reasons that we've already discussed, I think as a matter of law, judgment needs to be entered and the complaint dismissed in favor of the defendants.

THE COURT: Thank you, Mr. MacMain.

Mr. Kontos, let me ask you this, sir.

Does Ms. Long, the plaintiff, and the Tammy Long Estate, do they have state law claims?

MR. KONTOS: Not that I know of.

THE COURT: Because of the municipal governmental immunity, the Political Subdivision Torts Claims Act?

MR. KONTOS: Yes.

I just want to note one last thing with respect to the last exchange. I will be very brief.

Russell didn't have Morse, didn't have that ability to use that case and that analysis from Reed, and I think that that --

THE COURT: So effectively, I would have to say if Russell, at least at the motion to dismiss stage, if Russell was here, if we had the Russell case and you two gladiators for the parties here in the Russell case today, your argument, among other things, would include, Judge, Morse and Kneipp say you can't grant the motion to dismiss, we've pled enough, given Morse and Kneipp from this circuit to get to the next level of the litigation.

MR. KONTOS: Yes.

THE COURT: Okay. It's okay to say that.

MR. KONTOS: Good. Thank you.

THE COURT: We'll figure out who is right or wrong, but I think that's the necessary implication of your argument. If we flip the calendar and if we made Russell come after Morse and Kneipp, I think a necessary implication of the plaintiff's argument is Russell would come out differently, at least in terms of stating a claim at the motion to dismiss stage.

And Mr. MacMain, I think your argument is, A, Morse and Kneipp don't change Russell, but B, whatever court has the power to say that, it isn't this one.

MR. MacMAIN: I'm not sure I'd say that last point. I would say that there have been other district court judges

that have had, in essence, the same question posed and rejected the judgment; Judge Kane, Judge DuBois, Judge Bartle. Again, I haven't seen any -- I think you asked counsel this, there's not a single case --

THE COURT: I may be first.

MR. MacMAIN: There's not a single case that has been adopted.

THE COURT: The first to have to address this precise question in this precise way.

MR. MacMAIN: I don't know. I think Judge Kane, Judge Bartle, and Judge DuBois have already addressed the very same question. This would be affirmative in favor of the defendants that it doesn't change the law, the principle is still the same. You can't just have this amorphous zone of danger because there is no way to define it. I think if you had facts where there was a specific person, where there were threats made, that there was a whole series -- that's even --

THE COURT: Don't judges all the time say, they write something that goes like this, while we're not in a position to identify for all cases and in all situations the precise contours of the liability or the right in question here, we can't say with confidence that this falls within it. I mean it's sort of addressed that way reverting back to Justice Stewart's observation, he knows it when he sees it.

MR. MacMAIN: Right.

THE COURT: Mr. Kontos, anything else, sir?

MR. KONTOS: No, Your Honor. Thank you.

THE COURT: Ms. McGee?

MS. McGEE: No, Your Honor.

THE COURT: Mr. MacMain, anything else you'd like to say?

MR. MacMAIN: No, Your Honor.

THE COURT: Mr. Zimmerman, anything that we wanted to go over with counsel that got left unaddressed?

MR. ZIMMERMAN: Nothing further, Judge.

THE COURT: The Court is very appreciative of the briefing in this case. I found it to be complete, thorough, to the point, and completely avoiding the lengthiness that often appears in other briefs that we see. You framed the issue, I think it's a very focused and precise issue. We're going to have to go back and take the case law that everyone cited, read them again in the context of the points you made in argument today. We'll get a decision out as promptly as we can.

Mr. MacMain, any other business you think we ought to take up today while we're all here?

MR. MacMAIN: No, Your Honor.

THE COURT: Mr. Kontos or Ms. McGee?

MR. KONTOS: No, Your Honor.

THE COURT: You can adjourn the Court.

(Court adjourned.)

CERTIFICATE

I, Juliann A. Kienzle, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

s/Juliann A. Kienzle, RMR, CRR

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Juliann A. Kienzle, RMR, CRR